Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

WILLIE LELAND MCQUEEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit
Case No. 96-40356

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Sentencing Guidelines provide that the sentences for certain offenses may be enhanced if the commission of the offense involved an "abduction." As defined by the sentencing guidelines, abduction means that a victim was "forced" to accompany an offender to a different location. "Force" has been interpreted to be that "force necessary to overcome the particular victim's will." The question presented is the level of "force" necessary to constitute abduction of an adult victim for sentencing enhancement purposes.

LIST OF PARTIES TO THE JUDGMENT

Parties to this Proceeding:

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PETITION FOR WRIT OF CERTIORARI

Willie Leland McQueen ("Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, decided on October 23, 1996, is not reported. It is reprinted at Appendix A, *infra*, pp. 1a-2a.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Fifth Circuit was entered on October 23, 1996. On January 10, 1997, Justice Scalia extended the time for filing this petition for writ of certiorari to and including March 21, 1997 (Application No. A-491).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Ch. 2, Pt. E § 2E2.1, Making or Financing an Extortionate Extension of Credit; Collecting Extension of Credit by Extortionate Means (hereinafter referred to as "U.S.S.G. § 2E2.1"), provides, in pertinent part:

> (b)(3)(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels.

18 U.S.C. Ch. 1, Pt. B § 1B1.1, Application Instructions (hereinafter referred to as "U.S.S.G. § 1B1.1") provides, in pertinent part, in the commentary:

> Application Notes:
>
> 1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline of policy statement):
>
> (a) "Abducted" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

STATEMENT OF THE CASE

A. Course of Proceedings

This case presents the issue whether Petitioner's sentence for collection of extension of credit by extortionate means was properly enhanced based on Petitioner's alleged "abduction" of the victim.

On October 19, 1995, in a Superseding Indictment, the grand jury charged Petitioner and his co-defendant, Orlando Tyre Austin ("Austin"), (the "defendants"), with violations of (1) 18 U.S.C. § 894, participating in and conspiring to collect extension of credit by extortion; (2) 21 U.S.C. § 841(a), possession with intent to distribute crack cocaine; and (3) 21 U.S.C. § 846, conspiracy to possess with the intent to distribute. The counts also

charged Petitioner and Austin with aiding and abetting in violation of 18 U.S.C. § 2. The defendants entered not guilty pleas. Trial was held on November 13, 1995, following which the defendants were convicted on all three counts.[1]

A Presentence Report ("P.S.R.") for Petitioner was prepared on February 2, 1996, and an addendum to the P.S.R. was prepared on March 12, 1996. With regard to "abduction," the P.S.R. alleged:

> Austin and McQueen recognized Gaddis [the victim] as owing them money and demanded payment. Gaddis could not pay and was struck in the face by Austin and threatened. Gaddis was able to contact his mother who agreed to pay off Austin and McQueen for her son's debt. Austin and McQueen *forced* Gaddis into McQueen's car and proceeded to the home of Alice Gaddis, mother of John Gaddis. Once arriving at his mother's home, the cash ($75) was obtained, and Gaddis made his payment to Austin and McQueen. After returning to his cousin's apartment, Gaddis was *released* by Austin and McQueen. (emphasis added).

The P.S.R. recommended that Petitioner's offense level be increased by four levels for abduction of the victim, pursuant to U.S.S.G. § 2E2.1(b)(3)(A). Petitioner filed objections to the P.S.R. on February 26, 1996.

The district court adopted all of the findings of fact in the P.S.R. Petitioner was sentenced on March 29, 1996 to 151 months imprisonment to run concurrently on counts

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[1] Austin was charged and convicted on a fourth count but that count was dismissed prior to sentencing.

1, 2, and 3, to be followed by five years of supervised release.

On appeal to the United States Court of Appeals for the Fifth Circuit, Petitioner argued that John Gaddis ("Gaddis"), the victim of the collection of credit offense, was not abducted because he was not "forced" to go anywhere by Petitioner and/or Austin. The Court of Appeals for the Fifth Circuit affirmed Petitioner's convictions and sentences. Appendix A. On the abduction issue, the opinion stated as follows:

> The district court did not clearly err in imposing a Sentencing Guidelines enhancement based on a finding that the appellants had "abducted" one of their victims in committing the collection-of-credit offenses. *See United States v. Dumpson*, No. 95-50106, slip op. at 10 (5th Cir. Oct. 19, 1995) (unpublished); U.S.S.G. § 2E2.1(b)(3)(A)."

Appendix A at 2a. (The *Dumpson* opinion is attached to this petition as Appendix B.)

B. Statement of Facts

The following evidence at trial relates to Petitioner's sentencing enhancement for an alleged abduction.

1. Background to "Abduction"

Gaddis owed Petitioner and Austin $75 for cocaine. Around April 1995, Gaddis arrived at the apartment of his cousin, Sara Turner ("Turner"), where Petitioner and Austin were playing cards with Turner and Vanessa Palmer ("Palmer"). Petitioner and Austin demanded their

money from Gaddis. Gaddis was struck by Austin and Petitioner.

Sara Turner, at Gaddis' direction, telephoned her aunt, Alice Gaddis, Gaddis' mother, about paying Gaddis' debt. Turner claimed she believed Gaddis' life was in danger. Gaddis also talked to his mother. Gaddis' mother eventually agreed to pay the money and requested that Palmer come to her house to get it.

2. Gaddis is "Forced" to Go to His Mother's House

Palmer, Austin, Petitioner, and Gaddis drove to the home of Alice Gaddis. Palmer got the money from Alice Gaddis.

Alice Gaddis testified that Palmer said Gaddis would be getting out of the car down the road. Alice Gaddis also stated that Gaddis was not restrained in the car. Gaddis asked Petitioner and Austin for a ride back to Turner's apartment where the card party was still going on, and they agreed.

Gaddis returned with Austin, Petitioner, and Palmer to the apartment, accepted some more cocaine from Austin and Petitioner as a gift, and smoked the cocaine at the apartment. Gaddis later asked Austin and Petitioner for a ride home. They returned him to Alice Gaddis' house. Gaddis never called the police.

No weapon was involved in the events that night. No one testified as to any force or threat used to take Gaddis to his parents' home.

REASONS CERTIORARI SHOULD BE GRANTED

A. The Decision Below Conflicts with Other Courts' Decisions on the Important and Unresolved Issue of the Level of Force Necessary to Constitute "Abduction" of an Adult Victim for Sentencing Enhancement Purposes.

The decision of the United States Court of Appeals for the Fifth Circuit that Petitioner's sentence was properly enhanced for "abducting" his victim was erroneous and conflicts with other courts on an unresolved issue of substantial importance to criminal jurisprudence: the level of force necessary to constitute an "abduction" of an adult victim for sentencing enhancement purposes.

1. The sentencing guidelines do not define force.

The United States Sentencing Guidelines provide that the sentences for certain criminal offenses may be enhanced if the commission of the offense involved an "abduction." For example, U.S.S.G. § 2E2.1(b)(3)(A) provides that for a violation of 18 U.S.C. § 894, the offense for which Petitioner's sentence was enhanced, the number assigned to the base offense level will be increased by four levels "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." Comment 1(a) to § 1B1.1 of the sentencing guidelines defines abduction as follows:

> "Abducted" means that a victim was *forced* to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

U.S.S.G. § 1B1.1 (emphasis added). The term "force" is not defined in the sentencing guidelines. This Court has never interpreted the definition of abduction in U.S.S.G. § 1B1.1 or the issue of the level of force necessary to constitute abduction.

2. "Force" is interpreted as that force necessary to overcome the particular victim's will.

The federal courts wrestling with the question of the level of force necessary to constitute abduction have thus far interpreted it generally as that "force necessary to overcome the particular victim's will." In *United States v. Saknikent*, 30 F.3d 1012 (8th Cir. 1994), perhaps the leading case on this issue, the defendant appealed an abduction enhancement to his sentence for the rape and sodomy of a mentally retarded nine-year-old girl.[2] He argued there was no evidence that he physically forced his victim to accompany him to a different location. *Id.* at 1013-14.

The Eighth Circuit stated that "[w]hat situations are 'abductions' depend on how the term 'force' is defined" and referred to dictionary definitions of force for assistance:

> To "force" means to compel "by physical, moral, or intellectual means," or "to impose" or "to win one's way." [citation omitted] "Force" can also mean "constraining power, compulsion; strength directed to an end." [citation omitted] The level of "force" necessary to overcome

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[2] Although this case involves abduction of a child victim, its reasoning has been interpreted to apply to both adult and child abduction cases.

> another's will to resist is directly proportional to the development of the other's will. Saknikent's interpretation of "force" ignores this fact, and would result in less punishment for those who isolate the very young and very vulnerable whose wills are either undeveloped or can be overcome with less than a full blown assault.

Id. at 1013-14. The Eighth Circuit therefore ruled that an abduction occurs if there was "force necessary to overcome the particular victim's will." *See id.* at 1014. The court affirmed the sentence enhancement. *Id.* at 1015.

As in *Saknikent,* it appears from other opinions addressing abduction that a sentencing enhancement will only be affirmed for situations in which palpable force existed to overcome the will of the particular victim and move the victim to a different location. *See, e.g., United States v. Davis,* 48 F.3d 277, 279 (7th Cir. 1995) (credit union manager was abducted to facilitate commission of robbery offense when offender compelled him at gunpoint to accompany him from parking lot to inside of credit union); *United States v. Oliver,* 60 F.3d 547, 549, 554 (9th Cir. 1995) (defendants abducted victims by ordering victims out of a car, holding them at gunpoint, forcing one victim behind a liquor store and ordering him to lie on the ground, and forcing the other victim into one defendant's car and then releasing him); *United States v. Elkins,* 16 F.3d 952, 953 (8th Cir. 1994) (defendant bank robber abducted victim when he forced bank patron at knife-point out of bank and into the parking lot where he demanded the keys to the patron's vehicle; defendant later released the patron and escaped in the vehicle); *United States v. Nale,* 101 F.3d 1000, 1002 (4th Cir. 1996)

(woman's former boyfriend, who was carrying a firearm, abducted victims when he carjacked woman's current boyfriend's truck and drove with woman and current boyfriend down the road; offender then released current boyfriend and kidnapped woman who later escaped); *United States v. Hawkins*, 87 F.3d 722, 724-26 (5th Cir. 1996) (defendant carjackers abducted victims when he kicked and hit them, took their van keys, and ordered the victims at gunpoint to move to the victims' van); *United States v. Dumpson*, 70 F.3d 1268, No. 95-50106, slip op. at 9-11 (5th Cir. October 19, 1995) (unpublished) (Appendix B at 12a-14a) (even though victims agreed to get into defendant's car without the use of physical force, defendant who drove young girls, despite their protests, to a remote place in the desert and sexually assaulted them "abducted" them because they were forced against their will to accompany him alone into the desert); *United States v. Hershberger*, 972 F.2d 343, 1992 WL 175970, *1 (4th Cir. 1992) (unpublished) (robber abducted victim when he told bank employee he had a gun and forced the employee to accompany him out of the bank and across the street); *United States v. Amerson*, 864 F. Supp. 458, 465 (M.D. Pa. 1994) (ten-year old victim of sexual assault was abducted when she was forced to accompany offender at gunpoint to a different location and tied up with her shoelaces).

In contrast to the result in these cases, in *United States v. Eagle Thunder*, 893 F.2d 950, 955-56 (8th Cir. 1990), the Eighth Circuit expressed doubt about a sentencing enhancement for abduction when it was unclear whether a victim was returned to a vehicle "against her will":

> [W]e believe that the upward adjustment based on abduction was based on material misinformation. The government represented to the court that the adjustment for abduction was warranted because Eagle Thunder had removed Vanessa from the automobile and took her to another location where he raped her and that Vanessa had left the vehicle at one point and that Eagle Thunder had returned her to the automobile against her will. Vanessa refuted those statements at trial.

Id. at 956. Accordingly, the court remanded the case for resentencing to determine if an upward adjustment for abduction was warranted. *Id.*

3. Abduction of an adult victim likely must involve a weapon.

Importantly, the case law involving enhancement for abduction suggests that the abduction of adult victims should involve a weapon. *See, e.g., Davis,* 48 F.3d at 279; *Oliver,* 60 F.3d at 549, 554; *Elkins,* 16 F.3d at 953; *Nale,* 101 F.3d at 1002; *Hershberger,* 1992 WL 175970 at *1; *Hawkins,* 87 F.3d at 726. Petitioner cannot locate any case in which an abduction enhancement was affirmed, other than the present case, that did not involve the use of an actual or fake weapon in abducting an adult victim. Only in the cases involving abduction of a child victim is a weapon apparently unnecessary, because it is easier to overcome a child victim's will. *See, e.g., Saknikent,* 30 F.3d 1012; *Eagle Thunder,* 893 F.2d 950; *Dumpson,* slip op. at 11 (Appendix B at 13a).

4. Abduction of a victim likely must involve isolation alone with the offender.

Also significantly, the case law suggests that abduction must involve the isolation of the victim alone with the offender. *See, e.g., Oliver,* 60 F.3d at 549, 554; *Nale,* 101 F.3d at 1002; *Saknikent,* 30 F.3d 1012; *Dumpson,* slip op. at 11 (Appendix B at 13a); *Amerson,* 864 F. Supp. at 465. As the court explained in *Saknikent,* the sentencing enhancement is appropriate since abduction "increases the gravity of sexual assault or other crimes because the perpetrator's ability to isolate the victim increases the likelihood that the victim will be harmed." *See* 30 F.3d at 1013.

5. Abduction of a victim likely must involve movement to a location chosen by the offender.

Finally, the case law also appears to assume that, in an abduction, the movement to a different location must be to a location chosen by the offender. *See, e.g., Davis,* 48 F.3d at 279; *Oliver,* 60 F.3d at 549, 554; *Elkins,* 16 F.3d at 953; *Nale,* 101 F.3d at 1002; *Hershberger,* 1992 WL 175970 at *1; *Hawkins,* 87 F.3d at 726; *Dumpson,* slip op. at 1 (Appendix B at 4a-5a). Other than the present case, Petitioner cannot locate any decision in which an abduction enhancement was affirmed where the offender moved the victim to a location chosen by the victim.

6. The lower court's decision conflicts with other federal court decisions.

A conflict exists between the abduction enhancement law developed thus far by the decisions discussed above

and the decision of the Court of Appeals for the Fifth Circuit that abduction existed on the facts of this case. All of what appear to be key criteria on which enhanced sentences were properly affirmed in the other cases are missing in this case.

The allegations of force in the P.S.R. are simply not supported by the testimony in this case. As summarized in the Statement of Facts *supra,* no one testified directly or even suggested that the victim Gaddis was "forced" to accompany the defendants to his own mother's house. In fact, it was Gaddis' and/or his cousin's idea to go to his mother's house to collect the money he owed Petitioner and Austin. No weapon was involved. Gaddis was not isolated with the defendants because his cousin accompanied them. Gaddis himself stated that he was not forcibly detained, so there was no "release" as the P.S.R. alleged. Finally, Gaddis never tried to escape or expressed that he had the desire to escape. Instead, he was so comfortable with Petitioner and Austin that he accepted a ride back to the apartment from his parents' house to the party with them, smoked their gift of cocaine at the apartment, and asked them to drive him home. As in *Eagle Thunder,* the victim himself refuted the government's claims that his will was overcome. *See Eagle Thunder,* 893 F.2d at 951-52.

Petitioner submits that the definition of abduction in U.S.S.G. § 1B1.1 was never contemplated to apply to the quite different and less serious facts of this case and, in particular, to situations where neither the offense nor the movement of an adult victim to a different location involves a weapon; where the movement to a different

location does not isolate the victim; and where the location moved to is chosen by the victim or persons other than the offender. The lower court's decision is in conflict with the standard developed thus far for abduction by the other federal courts.

7. The standard of that "force necessary to overcome the particular victim's will" needs to be clarified with respect to adult victims.

This case presents more than a conflict among the courts of appeals due to the lower court's misapplication of what may be a correctly stated standard of force. The case demonstrates that the general standard developed thus far – the "force necessary to overcome the particular victim's will" – is too hazy to work in evaluating whether an adult victim was abducted.

The Fifth Circuit Court of Appeals' incorrect decision on the facts of this case highlights the danger that the current imprecise standard will continue to be misapplied without resolution by this Court. If the level of force necessary to overcome the particular victim's will is the appropriate standard and this standard depends on the development of the will of the victim, then the lower courts need further guidance on several issues: What level of force constitutes abduction of an adult victim? Must a weapon be present to forcibly abduct an adult? Must the victim be isolated only with the offender? Finally, must the different location moved to be chosen by the offender? Answers to these questions, by means of a more precise standard that addresses these factors, will allow the lower courts to properly distinguish between

those cases that clearly involve a level of force necessary to overcome an adult victim's will and those situations with less serious facts that may or may not fall within the contemplated scope of the definition of abduction in U.S.S.G. § 1B1.1

The need for clarification of the standard is real. The abduction enhancement opinions reflect uncertainty about the kind of facts that constitute an abduction. In *Saknikent,* for example, the court acknowledged that it was unable to find cases directly addressing the issue presented. *Saknikent,* 30 F.3d at 1013 n.2. And, in *Hawkins,* 87 F.3d at 726, the court pointed out that its "independent research has produced no cases in this Circuit interpreting the term 'abduction' that is helpful in determining whether the discrete facts of this case constitute an abduction."

The unresolved issue of the level of force necessary to overcome an adult victim's will is important and will continue to arise frequently because of the considerable number of cases decided by the lower courts that involve criminal violations subject to sentencing enhancement for abduction. In addition to the collection-of-credit offense, the criminal offenses subject to sentencing enhancement for abduction as defined by U.S.S.G. § 1B1.1 include other common offenses such as Criminal Sexual Abuse and Attempt to Commit Criminal Sexual Abuse (*see* 18 U.S.C. Ch. 2, Pt. A § 2A3.1); Robbery (*see* 18 U.S.C. Ch. 2, Pt. B § 2B3.1); and Extortion by Force or Threat of Injury or Serious Damage (*see* 18 U.S.C. Ch. 2, Pt. B § 2B3.2).

The unanswered questions raised by this case for all abduction enhancement cases provide a compelling basis

for this Court to review the lower court's decision. This Court should issue a writ of certiorari and review the judgment of the Fifth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for writ of certiorari. In the alternative, Petitioner requests that the Court summarily reverse and remand the case for resentencing.

Respectfully submitted,

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Submitted March 21, 1997.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40356
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE LELAND McQUEEN, also known as Will, and ORLANDO TYRE AUSTIN, also known as Lance,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:95-CR-33-2

(Filed Oct. 23, 1996)

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Codefendants-Appellants Willie Leland McQueen and Orlando Tyre Austin appeal their convictions and sentences for collection of extension of credit by

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

extortionate means, possession of cocaine base with intent to distribute, and conspiracy to possess cocaine base with intent to distribute, in violation of 18 U.S.C. § 894 and 21 U.S.C. §§ 841(a)(1) and 846. We have reviewed the arguments and the record and find no reversible error as to McQueen's claim that the evidence was insufficient to support his conspiracy conviction. *See United States v. Bermea*, 30 F.3d 1539, 1551 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1113 (1995); *United States v. El-Zoubi*, 993 F.2d 442, 445 (5th Cir. 1993). The district court did not clearly err in imposing a Sentencing Guidelines enhancement based on a finding that the appellants had "abducted" one of their victims in committing the collection-of-credit offenses. *See United States v. Dumpson*, No. 95-50106, slip op. at 10 (5th Cir. Oct. 19, 1995) (unpublished); U.S.S.G. § 2E2.1(b)(3)(A). The district court also did not clearly err in finding that Austin was a "leader" in the offense and that McQueen was a "manager." *See United States v. Musquiz*, 45 F.3d 927, 932-33 (5th Cir.), *cert. denied*, 116 S. Ct. 54 (1995); U.S.S.G. § 3B1.1(a), (b). Austin's contention that the district court violated Fed. R. Crim. P. 32 in adopting factual statements in his presentence report is meritless. *See United States v. Whitlow*, 979 F.2d 1008, 1011 (5th Cir. 1992). McQueen's argument that the district court issued a jury instruction on the collection-of-credit offense that was at variance with, or constructively amended, the superseding indictment is also without merit. *See United States v. Haymes*, 610 F.2d 309, 310-11 (5th Cir. 1980).

Austin's *pro se* motion to relieve his appointed appellate counsel of his duties is DENIED.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 95-50106

(Summary Calendar)

United States of America,

Plaintiff-Appellees,

versus

Paul Garfield Dumpson,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(93-CR-446)

(October 19, 1995)

Before HIGGINBOTHAM, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendant Paul Garfield Dumpson appeals his conviction on three counts of kidnapping a person under the age of eighteen within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. § 1201(a)(2), and five counts of aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a). Finding no error, we affirm.

I

This case involves the kidnapping and subsequent sexual assault of three minor females during a three-month period in 1993. All three offenses occurred on federal government property, at Fort Bliss, Texas. At time of the crimes, the young victims Christy, Monica, and Crystal were, respectively, sixteen, thirteen, and fifteen years of age.

The three incidents of kidnapping and sexual assault involved strikingly similar facts. In each instance, Dumpson approached the victim while driving an automobile; and the victim willingly agreed to get into the car with him.[1] At some point after Dumpson began driving, the victims became aware that he was transporting them to a location other than where they had requested to go. Each repeatedly asked to be let out of the car or to be taken to her desired destination. Ignoring their pleas, Dumpson

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[1] Both Christy and Crystal got into the car with Dumpson after he asked where they were going and offered to give them rides to their stated destinations. Monica apparently accompanied Dumpson after he asked her for directions and then offered her five dollars to get into the car and help him locate a certain street.

drove the young girls to a remote tract of federal land in the desert, where he assaulted them and forced them to take part in various sexual acts.

A jury convicted Dumpson of three counts of kidnapping a minor for the purpose of committing aggravated sexual abuse and five counts of aggravated sexual abuse. The district court sentenced him to terms of 500 months on each count to run concurrently. Dumpson appeals his convictions alleging: (1) that the trial court improperly allowed the prosecution to use leading questions; (2) that the use of leading questions deprived him of his constitutional right to confront the witnesses; (3) that the evidence was insufficient to support the kidnapping convictions; and (4) that the district court erred in sentencing.

II

Dumpson contends that the trial court committed reversible error by failing to sustain his objections to the prosecutor's use of leading questions during Crystal's testimony.[2] Dumpson also argues that his conviction

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[2] For example, the trial court overruled Dumpson's objection to the following line of questioning:

Q: Where did he put the knife?

A: I just saw him put – I am not really sure. I think he put it in the pocket or –

Q: Behind him somewhere?

A: Behind him somewhere. Yes.

Q: Then he had both hands free?

A: Yes.

should be reversed because the prosecutor's extensive use of leading questions amounted to testifying for each of the three victims.

As to those questions to which Dumpson lodged timely objections, we review the district court's actions for abuse of discretion.[3] *United States v. Clinical Leasing Service, Inc.*, 982 F.2d 900, 905 (5th Cir. 1992). We review the remaining leading questions for plain error. *See* FED. R. CRIM. P. 52(b); *United States v. Olano*, ___ U.S. ___, ___, 113 S. Ct. 1770, 1776, 123 L. Ed. 2d 508 (1993); *United States v. Steen*, 55 F.3d 1022, 1033 (5th Cir. 1995).

A

The use of leading questions during direct examination of a witness is restricted to instances where it is "necessary" to develop the testimony. FED. R. EVID. 611(c). Appellate courts traditionally have granted great deference to trial courts' rulings on the use of leading questions pursuant to Rule 611(c). *Stine v. Marathon Oil Co.*, 976 F.2d 254, 266 (5th Cir. 1992). We have found the use of leading questions to be "necessary" in eliciting testimony from a child witness. *See Rotolo v. U.S.*, 404 F.2d 316, 317 (5th Cir. 1968) (permitting leading questions with a fifteen-year-old witness); *see also* FED. R. EVID. 611(c), Advisory Committee's note (recognizing that child witnesses represent a traditional exception to the general rule that

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[3] The record reflects that Dumpson did not make a continuing objection to the prosecutor's use of leading questions, but lodged only three objections during Crystal's direct testimony, one of which the court sustained.

leading questions are undesirable). Other courts have also recognized this exception, especially in sex abuse cases. *See, e.g., United States v. Longie,* 984 F.2d 955, 958-59 (8th Cir. 1993) (finding leading questions appropriate to elicit testimony from twelve-year-old sex abuse victim); *United States v. Tome,* 3 F.3d 342, 352 (10th Cir. 1993) ("This circuit has long recognized the necessity of using leading questions to elicit testimony from child sex abuse victims."), *rev'd on other grounds,* ___ U.S. ___, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). Dumpson, however, argues that the use of leading questions was not "necessary" under the circumstances of this case.[4]

The record reflects that the judge and jury initially had difficulty hearing Crystal's testimony because she was extremely soft-spoken.[5] Moreover, Crystal was

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[4] In particular, Dumpson argues that this case is distinguishable because Crystal's age – sixteen at the time of the trial – did not necessitate the use of leading questions. Other courts, however, have upheld the use of leading questions in cases involving victims of similar ages. *See, e.g., United States v. Rossbach,* 701 F.2d 713, 718 (8th Cir. 1983) (upholding use of leading questions with rape and assault victims aged fifteen and seventeen), *cert. denied,* 498 U.S. 827, 111 S. Ct. 83, 112 L. Ed. 2d 56 (1990). Although age is an important criterion in determining whether the use of leading questions is appropriate, other circumstances should also be taken into consideration. *See, e.g., United States v. Castro-Romero,* 964 F.2d 942, 944 (9th Cir. 1992) (considering both age of victim and nature of testimony regarding sexual abuse).

[5] The district court was also experiencing acoustical problems with the courtroom microphone. The trial judge took the sound problems into consideration in denying Dumpson's first two objections to the leading questions. Dumpson's third objection was lodged after actions had been taken to solve the

highly upset and uncomfortable throughout much of her testimony, during which she was required to respond to explicit questions concerning a traumatic incident of sexual assault.[6] Under the circumstances, we conclude that the district court acted well within its discretion in allowing the prosecutor to use leading questions as necessary to develop the young victim's testimony. *See Rotolo*, 404 F.2d at 317 (allowing leading questions to develop testimony of nervous and upset young witness); *see also Tome*, 3 F.3d at 353 (allowing leading questions to develop testimony of young sex abuse victim who lost her composure and became reluctant to discuss the abuse incidents).

B

Dumpson also claims that the convictions should be overturned because the prosecutor essentially testified for the victims. Because Dumpson failed to object at trial, we reverse only if the excessive use of leading questions amounted to "clear" or "obvious" error which "affect[ed] substantial rights." *Olano*, ___ U.S. at ___, 113 S. Ct. at 1777-78. We correct a forfeited error only under exceptional and limited circumstances. *See Olano*, ___ U.S. at ___, 113 S. Ct. at 1779 ("The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.") (internal citation and quotations omitted). Dumpson's claim fails to

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acoustical problems, and the judge sustained this objection, noting that the microphone was "in better shape."

[6] The questioning was halted on at least two occasions to allow Crystal to stop crying and regain her composure.

meet this standard. Because the prosecutor's extensive use of leading questions was at least arguably permissible under the well-recognized exception for questions necessary to develop the testimony of child witnesses, we find no "clear" or "obvious" error. Moreover, there was overwhelming evidence presented at trial that Dumpson committed the sexual offenses, and he does not challenge its sufficiency on appeal.[7] Accordingly, we find that the prosecutor's use of leading questions could not have seriously affected the fairness or integrity of Dumpson's trial.

III

Dumpson also contends that the excessive use of leading questions during the victims' testimony violated his rights under the Confrontation Clause. We find no merit to this claim. "The Confrontation Clause of the Sixth Amendment gives the accused the right 'to be confronted with the witnesses against him.' This has long been read as securing an adequate opportunity to cross-examine adverse witnesses." *United States v. Owens*, 484 U.S. 554, 557, 108 S. Ct. 838, 841, 98 L. Ed. 2d 951 (1988). In this case, all three victims were physically present on the witness stand and available for cross-examination. The record reflects that Dumpson exercised his right under the Confrontation Clause by extensively

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[7] Dumpson's challenge to the sufficiency of the evidence on the kidnapping charges is based solely on the fact that the victims initially agreed willingly to accompany him.

cross-examining all three victims.[8] *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S. Ct. 989, 998, 94 L. Ed. 2d 40 (1987) (holding that the Confrontation Clause ensures a criminal defendant's right to physically face and cross-examine those who testify against him).

IV

Dumpson next contends that the evidence was insufficient to support the kidnapping convictions.[9] The sole basis for his sufficiency argument is that all three victims willingly accompanied him, and that consent is a complete defense to kidnapping.[10]

We must determine whether a rational trier of fact, when viewing the evidence in the light most favorable to the Government, could have found the essential elements of the offense beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd*, 462

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[8] The record contains approximately 100 pages of defense counsel's cross-examination of the victims.

[9] Dumpson was charged and convicted under federal law establishing the offense of kidnapping where an offender "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1201(a)(2).

[10] Although Dumpson suggests in his reply brief that the evidence should be found insufficient because the jury could not hear Crystal's testimony, we decline to address this argument because it was not presented in his initial brief. *N.L.R.B. v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1342 (5th Cir. 1993).

U.S. 356, 103 S. Ct. 2393, 76 L. Ed. 2d 638 (1983). As one necessary element, a federal kidnapping charge requires that the victim be an unconsenting person. *United States v. Davis*, 19 F.3d 166, 169 (5th Cir. 1994). In this case, it is undisputed that the victims initially consented to accompany Dumpson and willingly got into his car when he offered them a ride. However, the fact that a person originally accompanies someone by choice does not mean that a "kidnapping" cannot occur at a later stage. *See United States v. Peden*, 961 F.2d 517, 522 (5th Cir.) (concluding that evidence was sufficient to support federal kidnapping conviction where the victim agreed to accompany defendant to a restaurant and he instead took her to an isolated federal tract where he sexually assaulted her), *cert. denied*, ___ U.S. ___, 113 S. Ct. 392, 121 L. Ed. 2d 300 (1992); *United States v. McBryar*, 553 F.2d 433, 434 (5th Cir.) (upholding kidnapping conviction where defendant agreed to take victim to one destination, but then drove in opposite direction and refused her requests to be let out of the car), *cert. denied*, 434 U.S. 862, 98 S. Ct. 191, 54 L. Ed. 2d 136 (1977); *United States v. Eagle Thunder*, 893 F.2d 950, 952 (8th Cir. 1990) (finding sufficient evidence to support kidnapping where victim initially consented to accompany defendant, but was later detained despite her requests to be taken home).

Each of the victims testified that at some point during the ensuing trip she asked to be let out of the car or taken to her intended destination, but that Dumpson refused. The victims' initial consent therefore becomes irrelevant and provides no defense to the kidnapping that occurred afterwards. We find the evidence was sufficient to support the kidnapping convictions.

V

Dumpson argues that the district court misapplied the Sentencing Guidelines in two respects. First, he contends that the four-level enhancement for "abduction," pursuant to U.S.S.G. § 2A3.1(b)(5), was improperly added to his offense level for the kidnapping charges. Second, Dumpson contends that the district court erred by applying the two-level enhancement for inflicting "serious bodily injury" upon two of the victims, pursuant to U.S.S.G. § 2A3.1(b)(4).[11]

We review Dumpson's sentence to determine whether the district court correctly applied the Sentencing Guidelines to factual findings that are not clearly erroneous. *United States v. Montoya-Ortiz*, 7 F.3d 1171, 1179 (5th Cir. 1993). A factual finding is not clearly erroneous if it is plausible in light of the record viewed in its entirety. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76, 105 S. Ct. 1504, 1511-12, 84 L. Ed. 2d 518 (1985). Legal conclusions regarding the application of the Sentencing Guidelines are reviewed de novo. *Montoya-Ortiz*, 7 F.3d at 1179.

A

Dumpson contends that he did not "abduct" his victims within the meaning of the Sentencing Guidelines because they "willingly accompanied" him and because

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[11] Because it was raised for the first time in the reply brief, we will not consider Dumpson's argument that the district court erred by failing to apply the rule of lenity. *Cal-Maine Farms, Inc.*, 998 F.2d at 1342.

abduction requires the use of "force." He argues that the enhancement for "abduction" was not meant to apply to every "kidnapping." Dumpson relies on the definition of "abduction" found in the Guidelines:

> "Abducted" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

U.S.S.G. § 1B1.1, note 1(a).[12]

There is no requirement, however, that the offender must use *physical* force in order to "abduct" a victim. The district court found that an abduction had occurred at the point where Dumpson refused each victims' requests to be let out of the car or taken to her destination. This finding is plausible in light of the entire record. *Anderson*, 470 U.S. at 573-76, 105 S. Ct. at 1511-12. The increased penalty for "abduction" is based on the rationale that the offender's ability to isolate the victim increases the likelihood that the victim will be harmed. *United States v. Saknikent*, 30 F.3d 1012, 1012 (8th Cir. 1994). Therefore, because the victims were forced against their will to accompany Dumpson into the desert, we find that the district court's application of a four-level increase for "abduction" was not error. *See id.* at 1012 (holding that the abduction adjustment only requires "force" necessary to overcome the particular victim's will); *see also United*

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[12] To the extent that Dumpson relies on the example given in the definition, we note that these examples are "merely illustrative." U.S.S.G. § 1B1.1, comment. note 2.

States v. Galloway, 963 F.2d 1388, 1391-92 (10th Cir.) (holding that it did not constitute "cumulative punishment" to apply abduction enhancement to the crime of kidnapping for purposes of sexual abuse), *cert. denied*, ___ U.S. ___, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992).

B

Dumpson also contends that there was no evidence of "serious bodily injury" to satisfy the two-level increase to the base offense level for criminal sexual abuse as to two of the victims.[13] "Serious bodily injury" is defined as an "injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1, comment. note 1(j).

There was medical testimony at trial that both victims had suffered bleeding and lacerations in the vaginal area. The two victims also testified to their psychological pain following the sexual assault, including, in one case, an attempted suicide. The district court found that the victims had "suffered extreme physical pain at the time of the incident" and an impairment of their mental faculties, and that they "were emotionally traumatized in an extraordinary way." These findings are not clearly erroneous when viewed in light of the entire record, and we

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[13] The criminal conduct charge in Counts One through Three did not include a rape and there is no indication that the victim of those counts was injured.

therefore hold that the district court did not err by imposing an enhancement for serious bodily injury. *See United States v. Reed*, 26 F.3d 523, 530-31 (5th Cir. 1994) (holding that enhancement for serious bodily injury may be imposed where the victim suffered post-traumatic stress syndrome but no corporal injury), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

VI

For the foregoing reasons, we AFFIRM.